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Criminal Procedure—Assignment of Counsel Is Within Discretion of Court

Roger A. Olson

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topic. It is puzzling to ponder over the court's refusal to make this test the basis of the decision; or, in the alternative, to rely solely on the cited case of *People ex rel. Cohen v. Brown*,⁷⁸ which held that a wayward minor must make an intelligent waiver of his right to counsel. Curiously missing in the briefs of counsel and in the Court's opinion is *People v. Shannon*,⁷⁹ a well-reasoned recent Appellate Division case. There it was held that *youthful offender* proceedings were "criminal in nature," that *Lewis* was not controlling for that very reason, and that defendant could not "be convicted on his confession, standing alone." The Youthful Offender Provisions appear immediately after the Wayward Minor Sections. Their Section 913-n is the exact duplicate of Section 913-d of the Wayward Minor provisions and Section 45 of the Children's Court Act. There seems to be no substantial distinction between the cases. What may be said of one holds with equal impact for the other. But all the Court of Appeals was willing to say on the matter was that "there is some grounds for the assertion that it [*James*] was criminal in nature."⁸⁰

Perhaps the explanation lies in an examination of the basis for decision chosen by the Court. It has this merit; without expressly withdrawing from *Lewis*, and without foreclosing the question regarding the nature of a wayward minor proceeding, it has left itself an opening to pick and choose among the situations where, to its mind, wayward minors should be given the constitutional safeguards of a criminal trial. The method chosen has this obvious defect; the courts of original jurisdiction will be less surehanded in using their discretion to determine whether they are involved in the process of "saving" a child or "punishing" a criminal.

E. H.

ASSIGNMENT OF COUNSEL IS WITHIN DISCRETION OF COURT

A defendant accused of a felony may not be denied his right to counsel under our concept of a fair hearing, this right encompassing both the engagement of an attorney and the assignment by the court for an indigent defendant.⁸¹ In New York, if a defendant appears for arraignment without counsel, the court must ask if he desires one, and if so the court then must assign counsel.⁸² The selection of counsel in the instance of assignment is within the discretionary power of the judge, but to what extent does this discretion exclude the defendant from having a voice in such assignment? Whether this discretion may deny or interfere with the defendant's right to counsel, either in his inherent right to select and engage an attorney of his own choice, or in the manner of such assignment was the fundamental problem confronting the Court in *People v. Brabson*.⁸³

78. 278 App. Div. 576, 102 N.Y.S.2d 1 (2d Dep't 1951).

79. 1 A.D.2d 226, 149 N.Y.S.2d 550 (2d Dep't 1956).

80. *People v. James*, supra note 1 at 85, 211 N.Y.S.2d at 174.

81. *People v. Price*, 262 N.Y. 410, 187 N.E. 298 (1933).

82. N.Y. Code Crim. Proc. § 308.

83. 9 N.Y.2d 173, 212 N.Y.S.2d 403 (1961).

The appellant had three trials on the charge of murder in the first degree: the first resulted in a hung jury; a conviction in the second was later reversed for error;⁸⁴ and a final conviction in the third from which this appeal comes in a coram nobis proceeding. The appellant alleged that the trial judge in a hearing prior to the third trial interfered with his right to counsel of his own selection. The hearing was called to discharge his two attorneys, at his request, and to adjourn the trial for one week to enable him to engage his own counsel. At his next appearance before the judge, appellant stated that he had not secured the services of an attorney, that he was without funds, but that he desired either Mr. Landes or Mr. Richter who had previously defended him but who were discharged because he lacked confidence in them, to be assigned to this case. Mr. Richter announced that he would be willing to defend the appellant; however, the trial judge, acting in his discretion, assigned other counsel.

The Court of Appeals, affirming the denial of the writ, said that under these circumstances the defendant's right to counsel had not been interfered with. The selection of assigned counsel is a matter exclusively within the discretion of the court, the only necessary consideration being that those assigned be men of ability and integrity.

The law is fairly clear as to what constitutes an interference with the right to counsel. A defendant must be granted a fair opportunity to secure counsel of his own choice⁸⁵ and be allowed a reasonable time in which to prepare his case.⁸⁶ This right is always tempered by the rule that no defendant has the right to unreasonably delay his trial.⁸⁷ When a defendant comes into court without an attorney, after a reasonable time has been granted, and does not waive his right to counsel, it becomes the duty of the court to assign counsel in a capital offense. Failure to do so is a violation of due process under the Fourteenth Amendment, even though there is no request for an assignment.⁸⁸

R. A. O.

PROSPECTIVE DEFENDANT ENTITLED TO IMMUNITY FROM PROSECUTION FOR OTHER CRIMES BASED ON EVIDENCE GIVEN UNDER SUBPOENA

When a prospective defendant or target of an investigation is called to testify and be examined before a Grand Jury, his constitutionally-conferred privilege against self-incrimination is deemed violated.⁸⁹ "An automatic result of the violation of the constitutional privilege is that the defendant is protected not only from indictment based on any incriminating testimony which he may

84. *People v. Feolo*, 284 N.Y. 381, 31 N.E.2d 496 (1940).

85. *People v. McLaughlin*, 291 N.Y. 480, 27 N.Y.S.2d 772 (1944).

86. *Ibid.*

87. *People v. Milne*, 253 App. Div. 768, 1 N.Y.S.2d 1 (2d Dep't 1937).

88. *Powell v. Alabama*, 287 U.S. 45 (1932).

89. *People v. Steuding*, 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959); *People v. DeFeo*, 308 N.Y. 595, 127 N.E.2d 592 (1955); *People v. Ferola*, 215 N.Y. 285, 109 N.E. 500 (1915).